IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1624

JESSIE STEARNS,

Petitioner,

v.

VETERANS OF FOREIGN WARS,
A corporation chartered by
Congress of the United States,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES E. ROBBINS
1086 National Press Bldg.
Washington, D.C. 20045
Tel.: (202) 223-5554
Attorney for Petitioner.

Washington, D.C. • THIEL PRESS • (202) 638-4521

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

Page

Constitutional Provisions and Statutes Cited, continued:

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Jessie Stearns, prays that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case January 28, 1976.

OPINIONS BELOW.

All orders, opinions and judgments of the United States District Court for the District of Columbia and of

the United States Court of Appeals for the District of Columbia Circuit are set forth in the Appendix (A-D). Published opinions appear at 353 F. Supp. 473 (D.D.C. 1972), 500 F.2d 788 (U.S. App. D.C. 1974), and 394 F. Supp. 138 (D.D.C. 1975). Orders denying a petition for a hearing *en banc* and a rehearing were denied on February 19, 1976, and are also set forth in Appendix E.

JURISDICTION

The unpublished judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on January 28, 1976 (Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Was it not a violation of due process of the Fifth Amendment to the United States Constitution for the V.F.W., a corporation chartered by the Federal Government, and significantly involved with the Federal Government, to deny petitioner membership in the V.F.W. solely on the ground of her sex?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provision involved is the Fifth amendment; statutes involved are set forth in Appendix F.

STATEMENT OF THE CASE

The Veterans of Foreign Wars (V.F.W.) is a private corporation established under federal law, 36 U.S.C. Sec. 111, *et seq*. See especially 36 U.S.C. §§114, 115. Women are excluded from membership on the basis of a provision in the organization's bylaws which were enacted by the membership. It is not in dispute that the plaintiff is a woman who was denied membership in the V.F.W. but would have been otherwise entitled to join except for her

sex. The United States District Court for the District of Columbia, asserting jurisdiction under 28 U.S.C. §1331, entered summary judgment for the V.F.W. in a suit for an injunction against sex discrimination and for reconsideration of her application, brought under the Fifth amendment of the United States Constitution (Appendix A). The court held that the V.F.W.'s charter as enacted by Congress did not discriminate against women, and that the government was not so involved with the discriminatory provision enacted by the membership as to violate the equal protection guarantee in the due process clause of the Fifth amendment.

On appeal to the United States Court of Appeals for the District of Columbia, the court remanded the case for further proceedings so that the plaintiff could make the kind of showing contemplated under Rule 56 of the Federal Rules of Civil Procedure in an effort to avoid summary judgment for the V.F.W. (Appendix B). The court expressly sought review of the factors establishing a color of government involvement with the V.F.W., and how the nexus between the V.F.W. and the government fits into the doctrine of "governmental action" so as to subject the V.F.W.'s membership policies to scrutiny under the due process clause of the Fifth amendment.

The District Court considered the numerous "involvements" of the V.F.W. with the Federal government and stated that these factors, examined seriatim and in the aggregate fail to establish a "sufficiently close nexus" between the government and V.F.W. so that plaintiff may prevail in her Fifth amendment claim (Appendix C).

Appeal was again made to the United States Court of Appeals for the District of Columbia Circuit. In an unpublished judgment filed January 28, 1976, the Court of Appeals affirmed the judgment of the District Court

without opinion (Appendix D). Thereafter a motion for a hearing *en banc* and a rehearing were denied on February 19, 1976 (Appendix E).

This petition followed.

REASONS FOR GRANTING THE WRIT

The contact of the Federal Government with the V.F.W., a Federally chartered organization, is impermissible state involvement with discrimination on the basis of sex and as such violates the due process clause of the Fifth amendment. This Court has never passed on the application of the Fifth Amendment to federally chartered non-profit corporations.

In *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 722 (1961), the test was formulated for the recognition of state responsibility under the equal protection clause: only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be evaluated. This test was approved in *Reitman v. Mulkey,* 387 U.S. 369, 378 (1967). On the basis of the facts and circumstances in the instant situation, such test reveals that there is impermissible involvement by the Federal government with sex discrimination.

The congressional chartering of the V.F.W. is sufficient evidence of significant state involvement in private discrimination that is violative of the equal protection guaranteed in the due process clause of the Fifth amendment. A recent Note, entitled "Discriminatory Membership Policies in Federally Chartered Nonprofit Corporations," 72 *Mich. L. Rev.* 1265, 1287 (1974), observes that *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961), and *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972), support the holding that a grant of

a federal charter is sufficient governmental involvement to impose equal protection limitations on a recipient's membership policies. Federal charters are grants of congressional recognition of public acclaim and prestige, as evidenced by the language of 36 U.S.C. Sec. 113.

This Court has never passed on the application of Fifth amendment protections to Federally chartered non-profit corporations. This would appear to be good reason for granting the writ.

There are other significant involvements with the V.F.W. beyond the Federal charter that indicate impermissible state involvement. These are detailed in the District Court's opinion (Appendix C). The Court is requested to note especially that under 36 U.S.C. Sec. 120, Congress reserved the right to appeal, alter, or amend the legislation authorizing the charter which indicates a continuing and systematic congressional review as well as involvement with the very injury to the plaintiff. See *The New York City Jaycees, Inc. v. The United States Jaycees,* 512 F.2d 856 (2d Cir. 1975). (The Jaycees are not Federally-chartered. None of the cases cited by the lower courts or the parties involved Federally-chartered organizations.)

The V.F.W. has a special federal income tax status both in its exemption from tax on its income, 26 U.S.C. Sec. 501(c)(4), and in the deductions from gross income awarded those who make contributions to the V.F.W., 26 U.S.C. Sec. 170(c). These tax incentives reveal a congressional intent to implement a social and economic policy of government assistance to the V.F.W. This tax status also warrants the conclusion that there is congressional approval of V.F.W. activities and purposes, as well as its performance of such public function, *i.e.,* a government "subsidy." In *McGlotten v. Connally,* 338 F.Supp. 448

(D.D.C. 1972), the Secretary of the Treasury was enjoined from granting tax exemptions to racially discriminatory fraternal organizations and from permitting donors to those organizations to deduct their contributions. The three-judge *McGlotten* court said: "We think this exclusion (from Federal tax), provided only to particular organizations with particular purposes, rather than across the board, is sufficient government involvement to invoke the Fifth Amendment. By providing differential treatment to only selected organizations, the government has indicated approval of the organizations, and hence their discriminatory practice, and aided that discrimination by the provision of federal tax benefits." 338 F. Supp. at 459.

Under 38 U.S.C. Sec. 3402, the Administrator of the Veterans Administration is authorized to recognize the representatives of the V.F.W. for the purpose of prosecuting claims under the laws administered by the V.A. and also to furnish office space to V.F.W. representatives. This activity on the part of the V.F.W. suggests that it performs a public function, similar to that in *Evans v. Newton,* 382 U.S. 296 (1966), and *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961). 36 U.S.C. Sec. 113 states the purposes of the corporation, many of which are "mutual benefits" to the government and the V.F.W. members. Accordingly, there appears to be that "symbiotic relationship" between the federal government that was found in *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961), but that was absent in *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972). In granting recognition and space to the V.F.W., an organization that bars women, the Veterans Administration is effectively barring women from much of the practice before it. See *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957). This exclusion alone is enough to constitute unlawful action.

Further, Congress receives an annual independent audit of V.F.W. finances, conducted pursuant to 36 U.S.C. Secs. 1102-1103. The V.F.W. is entitled to receive loans or gifts of obsolete or surplus equipment, under 10 U.S.C. Sec. 2572 and does receive such loans and gifts. Under 36 U.S.C. Sec. 118 the V.F.W. is required to make reports of its proceedings to Congress.

Although the Supreme Court has never held sex a suspect classification and applied strict scrutiny analysis to such discrimination, it does not appear that any reasonable purpose is achieved by restricting membership in the V.F.W. to males. Unlike the Boy Scouts or the Girl Scouts, the V.F.W. has a sexually neutral purpose.

In *Reed v. Reed,* 404 U.S. 71 (1971), the Supreme Court considered a mandatory provision of the Idaho probate code that gives preference to men over women when persons of the same entitlement class apply for appointment as administrator of a decedent's estate. The Court found that since the statute provided that different treatment be accorded to the applicants on the basis of their sex, it thus established a classification subject to scrutiny under the equal protection clause. 404 U.S. at 75. The Court held that regardless of their sex, persons within any one of the enumerated classes of the statute are similarly situated with respect to that objective; accordingly, by providing dissimilar treatment for men and women who are thus similarly situated, the challenged statute violated the equal protection clause. 404 U.S. at 77. In the instant situation, given the objectives in 36 U.S.C. Sec. 113, by providing for or encouraging dissimilar treatment of men and women, the due process clause of the Fifth amendment has been violated.

In *Frontiero v. Richardson,* 411 U.S. 677, 687 (1973), four members of the Supreme Court found that Congress

itself has concluded that classifications based upon sex are inherently invidious.

CONCLUSION

This Court is requested to review this case because it presents an important Constitutional question involving individual rights; has a potentially wide effect on the general population, presents a question of great interest to women generally, and because of the public policy against sex discrimination which can be found in recent Congressional enactments, e.g., the Equal Pay Act, 29 U.S.C. Sec. 206(d), and recent decisions of the Supreme Court, e.g., *Frontiero v. Richardson,* 411 U.S. 677 (1973) and *Reed v. Reed,* 404 U.S. 71 (1971).

Respectfully submitted,

CHARLES E. ROBBINS

1086 National Press Bldg.
Washington, D.C. 20045
Tel.: (202) 223-5554

Counsel for Petitioner.

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JESSE STEARNS	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil Action
	)	No. 1415-72
VETERANS OF FOREIGN WARS	)	
A corporation chartered by Congress of the United States	)	
	)	
Defendant	)	
	)	

ORDER DENYING SUMMARY JUDGMENT FOR PLAINTIFF AND GRANTING SUMMARY JUDGMENT TO DEFENDANT

Upon consideration of the motion of the defendant for judgment on the pleadings (treated herein as a Motion for Summary Judgment), and the Motion of the plaintiff for Summary Judgment, the pleadings, the sworn statement and exhibits filed herein, and the Court having concluded that there is no genuine issue of a material fact and that the defendant is entitled to judgment as a matter of law, and having filed its Memorandum Opinion herein, it is by the Court this 29th day of December, 1972,

ORDERED:

1. That plaintiff's motion for summary judgment be and the same hereby is denied.

2. That summary judgment be and the same is hereby granted to the defendant and plaintiff's complaint is hereby dismissed.

/s/ Joseph C. Waddy
JUDGE

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[473]

Jessie STEARNS, Plaintiff,

v.

VETERANS OF FOREIGN WARS, a corporation chartered by Congress of the United States, Defendant.

Civ. A. No. 1415–72.

United States District Court,
District of Columbia.

Dec. 29, 1972.

* * *

[474] Charles E. Robbins, Washington, D. C., for plaintiff.

Marilyn D. Sloan, Center for Women Policy Studies, and Margaret J. Gates, Washington Women's Legal Defense Fund, Washington, D. C., Amicus Curiae.

Wilmer S. Schantz, Jr., Schantz, Stock & Marshall, McLean, Va., for defendant.

MEMORANDUM OPINION

WADDY, District Judge.

In this suit plaintiff seeks an order of the Court directing the defendant, Veterans of Foreign Wars (hereinafter V. F.W.), a corporation chartered by Congress, to reconsider her application for membership in said organization and enjoining V.F.W. from barring membership to plaintiff on the ground that she is a member of the female sex. Plaintiff also seeks compensatory and exemplary damages, counsel fees and costs. The

matter is before the Court on defendant's motion for judgment on the pleadings and plaintiff's motion for summary judgment. In addition to the submissions of the parties on said motions, plaintiff's motion is supported by a memorandum of law filed by the Center for Women Policy Studies and the Washington Women's Defense Fund as *amicus curiae*. Matters outside the pleadings have been presented and considered by the Court. Accordingly defendant's motion is treated herein as a motion for summary judgment pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

In an amendment to her complaint plaintiff has alleged that this Court has jurisdiction ". . . under 28 U.S.C. Sec. 1343 (civil rights); 42 U.S.C. Sec. 1981 (civil rights); 42 U.S.C. Sec. 1983 (civil rights); 11 D.C.Code Sec. 521; 28 U.S.C. Sec. 1331; 28 U.S.C. Sec. 2201; and the Constitution and laws of the United States and amendments thereto. The purpose of this suit is to remedy the invidious discrimination against plaintiff by the Veterans of Foreign Wars solely on the grounds of her sex in violation of the Constitution and laws of the United States."

The plaintiff, a woman, is an honorably discharged veteran of the armed forces of the United States who served fourteen months active duty in Australia, New Guinea, the Philippines and China during World War II.

The defendant, V.F.W., is a corporation chartered by Congress, 36 U.S.C. § 111 et seq., whose membership consists of veterans of the armed forces of the United States.

On February 3, 1971, plaintiff, by letter, inquired concerning membership in V.F.W. and stated her desire to become a member thereof.

On or about February 8, 1971, plaintiff received a letter in response to her inquiry and stated desire from Julian Dickenson, the Adjutant General of the V.F.W., which stated in part,

> "At the organizational meeting at which the Veterans of Foreign Wars was established, the founders adopted a Constitution. The Constitution contains the fundamental provisions and principles on which the government of the V.F.W. is based. Eligibility qualifications were fixed at that time. Both the membership Article of the Constitution and its Preamble limit membership to males."

That letter also stated:

> "Last year the Commander-in-Chief submitted a proposal to the National Convention to change eligibility requirements so as to admit otherwise qualified females. That proposal was defeated by the delegates."

Mr. Dickenson's letter was typewritten. However, at the end of it, after his signature, the following handwritten state-

[475] ment appears:

"I do promise a (sic) Amendment to National By-Laws eliminating the word Male or Men at our National Conference in Dallas, Texas Aug. 13–22, 1971."

[1] At the outset the Court is faced with the question of jurisdiction. V.F.W. was incorporated by Act of Congress May 28, 1936 (36 U.S.C. § 111 et seq.). The Charter was amended May 28, 1953. Title 28 U.S.C. § 1349 provides that:

"The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock."

There is neither allegation nor proof in this case that V.F.W. is a stock corporation in which the United States owns more than fifty percent of the capital stock. Therefore if jurisdiction exists at all it must be under 28 U.S.C. § 1331.

It appears to the Court that jurisdiction to entertain this suit does exist in that plaintiff seeks recovery directly under the Constitution and laws of the United States and her claims are not wholly insubstantial and frivolous. Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

The membership clause of the corporate charter (36 U.S.C. § 115) provides

in pertinent part that

"No person shall be a member of this corporation unless he has served honorably as an officer or enlisted man in the Armed Forces of the United States of America in any foreign war, insurrection, or expedition . . . .".

[2] Plaintiff asserts that she has been excluded from membership in V.F.W. solely because of her sex and that such exclusion unlawfully discriminates against her and is violative of the due process clause of the 5th Amendment of the Constitution of the United States. In support of her position she argues (1) that the membership clause of the corporate charter of V.F.W. limits membership in the organization to males, thereby unconstitutionally denying plaintiff equal protection; and (2) that even if the charter itself does not limit membership to males, federal chartering alone constitutes the kind of significant state involvement in private discriminations that is violative of the Fifth Amendment.

This Court has concluded that neither of plaintiff's contentions is sound. First, an analysis of the language of the charter relating to membership (36 U.S.C. § 115) and the legislative history of the 1953 Amendment to that section[1]

1. S.Rep.No.241, 83rd Cong. 1st Sess. 2 (1953); U.S.Code Cong. & Admin.News 1953, p. 1608.

demonstrate that there was no Congressional intent to limit membership in the organization to males. The use of the pronoun "he" and the words "enlisted man" cannot reasonably be construed to be anything more than grammatical imprecision in drafting the clause. Masculine pronouns are often used to refer to antecedents of indefinite or mixed gender without modifying the meaning of the antecedents. Here, the pronoun "he" refers to the word "person", which latter term obviously encompasses both male and female persons. This legislative intent is demonstrated further by the Senate Report which accompanied the 1953 Amendment to the membership clause.[2]

The report states that:

"The purpose of the proposed legislation is to broaden the Congressional
[476] charter of the Veterans of Foreign Wars of the United States, so as to make eligible for membership therein *all persons* who have served in the Armed Forces of the United States under the conditions specified in the

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2. The 1953 amendment substituted the words "Armed Forces" for the words "Army, Navy, and Marines" in the membership clause. 36 U.S.C. § 115. The occasion for the amendment was to include the Air Force within the ambit of the charter. The Air Force did not exist as a separate service when the original V.F.W. charter was issued by Congress. S.Rep.No.241, *supra*.

charter and who otherwise are eligible for membership." (emphasis supplied)

If Congress had intended to limit membership in the organization to men it would have been easy for it to have inserted the word "male" between the words "all" and "persons".

Furthermore, the record is clear that the restriction of membership in the organization to males results from the Constitution enacted by the membership and not because of any requirement or limitation in the charter. A proposal to amend the Constitution so as to admit women to the organization was defeated by vote of the delegates to the 1970 V.F.W. National Convention.[3] Obviously, the V.F.W., itself, does not feel constrained by the language of the *membership clause of its charter* to limit its membership to men, but relies solely upon the Constitution enacted by its members.

[3] Absent any discriminatory language in the charter itself, the only issue left for the Court is whether or not Congressional chartering alone constitutes the kind of significant state involvement in private discriminations that is violative of the equal protection guarantee in the due process clause of the Fifth Amendment. The Court finds that it does not. Cf. Moose Lodge No.

107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972).

Based upon the foregoing the Court has concluded that there is no genuine issue of a material fact and that defendant is entitled to judgment as a matter of law and plaintiff's motion for summary judgment should be denied.

* * *

APPENDIX B

[788] **Jessie STEARNS, Appellant,**

v.

VETERANS OF FOREIGN WARS, a corporation chartered by Congress of the United States.

No. 73-1197.

United States Court of Appeals, District of Columbia Circuit.

Argued Jan. 25, 1974.

Decided June 19, 1974.

* * *

[789] Charles E. Robbins, Washington, D. C., for appellant.

Wilmer S. Schantz, Jr., McLean, Va., for appellee.

Before LEVENTHAL, MacKINNON and WILKEY, Circuit Judges.

LEVENTHAL, Circuit Judge:

Appellant, a female veteran, applied for membership in the Veterans of Foreign Wars (VFW), an organization of veterans having military service outside the United States entitling them to a recognized campaign medal. Her application was denied, and she sues the VFW for damages and an injunction directing reconsideration of her application, which she alleges was denied solely because of her sex.

The VFW is a corporation chartered by Act of Congress, 36 U.S.C. § 111 et seq. The constitution of the VFW lim-

its membership to men who meet the military service requirements. Appellant contends that VFW's restriction of membership to qualified males violates the due process clause of the Fifth Amendment. The District Court found jurisdiction under 28 U.S.C. § 1331 [1] and, treating the VFW's motion for judgment on the pleadings as a motion for summary judgment, dismissed the complaint. Stearns v. VFW, 353 F. Supp. 473 (D.D.C.1972).

The membership provision of the charter, 36 U.S.C. § 115, provides in pertinent part that

> No person shall be a member of this corporation unless he has served honorably as an officer or enlisted man in the Armed Forces of the United States of America in any foreign war, insurrection, or expedition . . . .

The District Court found that this provision does not restrict the membership of the VFW to males:

> The use of the pronoun "he" and the words "enlisted man" cannot reasonably be construed to be anything more than grammatical imprecision in drafting the clause. Masculine pronouns are often used to refer to antecedents of indefinite or mixed gender without modifying the meaning of the

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1. Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

> antecedents. 353 F.Supp. at 475.

This interpretation is supported by the rules of construction codified at 1 U.S.C. § 1, providing in pertinent part that "words importing the masculine gender include the feminine as well . . . ." In addition, the District Court cited language in the legislative history,[2] and noted that certain officers of the VFW had proposed amendment of the organization's constitution to delete the "males only" membership restriction, thus indicating their view that the restriction was not mandated by the charter.

Having concluded that the statutory charter did not itself mandate discrimination on the basis of sex, the District Court stated that "the only issue left for the Court is whether or not Congressional chartering alone constitutes the

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2. The District Court cited an excerpt from the Senate Report on a 1953 amendment to the membership clause extending eligibility to veterans of the Air Force:

> The purpose of the proposed legislation is to broaden the congressional charter of the Veterans of Foreign Wars of the United States, so as to make eligible for membership therein *all persons* who have served in the Armed Forces of the United States under the conditions specified in the charter and who otherwise are eligible for membership. (Emphasis added.)

See S.Rep.No.241, 83d Cong., 1st Sess. 2 (1953), U.S.Code Cong. & Admin.News, p. 1668.

[790] kind of significant state involvement in private discriminations that is violative of the equal protection guarantee in the due process clause of the Fifth Amendment." The court found that requisite government involvement lacking, citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972).

[1] While we are inclined to agree that Congressional chartering *alone* does not constitute significant government involvement that triggers due process guarantees, appellant insists that Government involvement with VFW goes beyond mere chartering. She points to the requirement of presentations to Congress of annual reports of proceedings[3] and of audits of finances;[4] to VFW's entitlement to loans or gifts of condemned or obsolete combat material;[5] to its special federal income tax status both in its exemption from a tax on income, 26 U.S.C. § 501(c)(4), and in the deductions from gross income accorded those who make contributions to the VFW, 26 U.S.C. § 170(c); and to the authorization, contained in 38 U.S.C. § 3402, of the Administrator of the Veterans Administration to recognize representatives of the VFW for the purpose of prosecuting claims under laws admin-

3. 36 U.S.C. § 118.

4. 36 U.S.C. §§ 1102, 1103.

5. 10 U.S.C. § 2572.

istered by the Veterans Administration, and the further authorization to furnish office space to VFW representatives.

The foregoing factors establish a color of government involvement with the VFW that is not adequately described as "Congressional chartering." They invite further examination of the nexus between the VFW and the Government and consideration of how that nexus fits into the doctrine of "state action." [6]

6. The conferral of tax advantage has been held, in certain circumstances, to constitute the kind of government involvement that makes due process requirements of non-discrimination applicable. McGlotten v. Connally, 338 F.Supp. 448 (D.D.C.1972), held that the granting of an income tax exemption under I.R.C. § 501(c)(3) to private organizations excluding non-whites from membership violated the Fifth Amendment. *See also* Green v. Connally, 330 F.Supp. 1150 (D.D.C.), affirmed per curiam sub. nom. Coit v. Green, 404 U.S. 997, 92 S.Ct. 564, 30 L.Ed.2d 550 (1971) (I.R.C. does not authorize tax exemption for and deductibility of contributions to private school which excludes non-white students). Similarly, the recognition of the VFW pursuant to 38 U.S.C. § 3402 at least suggests a coincidence of private association and public function which warrants further probing. *Cf.* Evans v. Newton, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961); Gilmore v. City of Montgomery, 473 F.2d 832 (5th Cir. 1973), cert. granted, 414 U.S. 907, 94 S.Ct. 215, 38 L.Ed.2d 145 (1973).

The procedures followed in the District Court did not embrace such an inquiry. The VFW moved for judgment on the pleadings under F.R.C.P. 12(c). Plaintiff responded with a motion for summary judgment. The court disposed of both motions without oral argument, stating that it was considering matters outside the pleadings and treating the VFW's motion as one for summary judgment, as is authorized under Rule 12(c).[7] It appears, however, that appellant did not have the opportunity, required when a motion for judgment on the pleadings is treated as a motion for summary judgment, to "present all material made pertinent to such a motion by Rule 56."

The VFW, had it moved for summary judgment under Rule 56, would have been required under Rule 1–9(g) of the

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7. Rule 12(c) provides:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

[791] local rules of the District Court[8] to file a "statement of the material facts as to which the moving party contends there is no genuine issue." Thereafter, appellant would have had an opportunity to file a statement of issues and affidavits designed to show a dispute as to material facts. In addition, appellant could have sought the protection of Rule 56(f), which provides that

> . . . Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[2] Until now the appellant has had no occasion in the District Court to make the kind of presentation comprehended by Rule 56. Appellant had no right to do so in response to the VFW's Rule 12(c) motion, which challenged the sufficiency of appellant's pleadings, particularly the allegations of jurisdiction and of deprivation of constitutional

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8. Formerly Rule 9(h).

rights.[9] The fact that appellant erred in seeking summary judgment on the theory that the Congressional chartering statutes were alone sufficient to trigger due process guarantees did not disable appellant from bringing forth facts of additional government involvement in order to resist a summary disposition in favor of defendant VFW.

[3] We remand to the District Court so that the appellant may make the kind of showing contemplated under Rule 56 in an effort to avoid summary judgment for the VFW. Our remand is not to be taken as any indication of our views on the merits. The issues raised are of such a nature that we do not think an appellate court should consider them without having the benefit of the judgment of the District Court, rendered after the parties have had an opportunity to develop the full factual background of government involvement with the VFW.

The case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

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9. Had appellant presented materials outside the pleadings in response to defendant's 12(c) motion, the District Court could in its discretion have excluded them in ruling on the motion. *See* Young v. First National Bank of Chicago, 85 F.Supp. 68 (N.D.Ill. 1949).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JESSIE STEARNS	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil Action
	)	No. 1415-72
VETERANS OF FOREIGN WARS	)	
A corporation chartered by Congress of the United States	)	
Defendant	)	
	)	

ORDER

Upon consideration of the cross-motions of the parties for summary judgment, the memoranda of points and authorities in support thereof and in opposition thereto, the respective statements of material facts as to which there exists no genuine issue, the exhibits and affidavits filed herein, the entire record herein, and the Court having heard oral argument, and it appearing to the Court, in accordance with the memorandum opinion filed herein this same date, that there exists no genuine issue of material fact and that defendant is entitled to judgment as a matter of law, it is by the Court this 29th day of April, 1975.

ORDERED, that the motion of plaintiff for summary judgment be, and the same hereby is, denied; it is further

ORDERED, that the motion of defendant for summary judgment be, and the same hereby is, granted and this case dismissed.

/s/ Joseph C. Waddy
JUDGE

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[138] **Jessie STEARNS, Plaintiff,**

v.

VETERANS OF FOREIGN WARS, a corporation chartered by Congress of the United States, Defendant.

Civ. A. No. 1415-72.

United States District Court, District of Columbia.

April 29, 1975.

* * *

[139] Charles E. Robbins, Washington, D. C., for plaintiff.

Wilmer S. Schantz, Jr., McLean, Va., for defendant.

MEMORANDUM OPINION

WADDY, District Judge.

In this action, plaintiff, a female veteran, seeks an order directing defendant Veterans of Foreign Wars of the United States (VFW), a corporation chartered by Act of Congress, 36 U.S.C. § 111 et seq., to reconsider her application for membership in said organization and enjoining defendant from barring her membership solely because she is a female. The bylaws of the VFW limits membership to men who meet the military service requirement, *i. e.*, those having military service outside the United States entitling them to a recognized campaign medal. This membership limitation, plaintiff asserts, violates the equal protection guarantee in the due process clause of the 5th Amendment

of the Constitution of the United States. Plaintiff further seeks compensatory and exemplary damages, counsel fees, and costs.

On December 29, 1972, this Court denied plaintiff's motion for summary
[140] judgment and, treating defendant's motion for judgment on the pleadings as one for summary judgment pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, the Court having considered matters outside the pleadings, entered summary judgment for defendant. The opinion of this Court is reported at 353 F.Supp. 473.

Plaintiff appealed the judgment. On June 19, 1974, the Court of Appeals for the District of Columbia Circuit, in an opinion reported at 500 F.2d 788, having found that plaintiff had not been given the opportunity to "present all material made pertinent to such a motion by Rule 56" as required by Rule 12(c) of the Federal Rules of Civil Procedure when a motion for judgment on the pleadings is treated as a motion for summary judgment, remanded this case for "proceedings not inconsistent" with its opinion.

Plaintiff's original motion for summary judgment was premised on two grounds, *i. e.*, that (1) the membership clause of the corporate charter of the VFW limits membership in the organization to males, thereby unconstitutionally denying plaintiff equal protection, and

(2) that even if the charter itself does not limit membership to males, federal chartering alone constitutes the kind of significant government involvement in private discriminations that is violative of the 5th Amendment. 353 F.Supp. at 475. Other than the fact that VFW had been granted a federal corporate charter, the record before the Court was bare of any further government involvement with the VFW. Finding subject-matter jurisdiction pursuant to 28 U.S.C. § 1331, 353 F.Supp. at 475, this Court further found that there existed no issue of material fact, that the corporate charter did not mandate discrimination on the basis of sex, 353 F.Supp. at 475–6, and that Congressional chartering alone, as a matter of law, does not constitute the kind of significant government involvement in private discriminations that is violative of the equal protection guarantee in the due process clause of the 5th Amendment. 353 F.Supp at 476. Accordingly, the Court concluded that defendant was entitled to judgment as a matter of law and granted summary judgment for defendant.

On appeal, plaintiff argued, for the first time, that the involvement of the government with VFW went beyond mere chartering. Plaintiff pointed

> "to the requirement of presentations to Congress of annual reports of proceedings [36 U.S.C. § 118] and of

audits of finances [36 U.S.C. §§ 1102, 1103]; to VFW's entitlement to loans or gifts of condemned or obsolete combat material [10 U.S.C. § 2572]; to its special federal income tax status both in its exemption from a tax on income, 26 U.S.C. § 501(c)(4), and in the deductions from gross income accorded those who make contributions to the VFW, 26 U.S.C. § 170(c); and to the authorization, contained in 38 U.S.C. § 3402, of the Administrator of the Veterans Administration to recognize representatives of the VFW for the purpose of prosecuting claims under laws administered by the Veterans Administration, and the further authorization to furnish office space to VFW representatives." 500 F.2d at 790. (Footnotes in brackets).

The Court of Appeals, although not reaching the merits of this case, stated that while it was "inclined to agree" with the conclusion of this Court that "Congressional chartering alone does not constitute significant government involvement that triggers due process guarantees," 500 F.2d at 790, the aforementioned factors presented to the Court on appeal

> "establish a color of government involvement with VFW that is not adequately described as 'Congressional chartering.' They invite further examination of the nexus between the VFW and the Government and consideration of how that nexus fits into the doctrine of 'state action.'" (Footnote omitted). 500 F.2d at 790.

[141] Noting that

> "[t]he fact that [plaintiff] erred in seeking summary judgment on the theory that the Congressional chartering statutes were alone sufficient to trigger due process guarantees did not disable [plaintiff] from bringing forth facts of additional government involvement in order to resist a summary disposition in favor of defendant VFW," 500 F.2d at 791,

that Court remanded the case so that plaintiff might "make the kind of showing contemplated under Rule 56 in an effort to avoid summary judgment for the VFW." 500 F.2d at 791.

Now pending before this Court are cross-motions for summary judgment filed by the parties subsequent to the remand from the Court of Appeals. Plaintiff has been afforded additional time for discovery. As a result thereof, the Court now has before it the deposition of Francis W. Stover, National Legislative Director of VFW, and answers to interrogatories propounded to defendant by plaintiff. Oral argument has been heard on the pending motions. In addition to the memoranda and exhibits submitted in support of and in opposition to the respective motions, and the respective statements of material facts

as to which there is no genuine issue,[1] the parties have submitted post-hearing memoranda. In addition to the foregoing the Court has considered the entire record herein, as well as the guidance provided by the Court of Appeals in remanding this action.

Although the record herein has been factually supplemented in the manner indicated in footnote 1 below, it is the opinion of the Court that these supplemental facts are not material to the issues decided previously by the Court in its original opinion. Further, the Court remains unpersuaded to change its holdings therein. Accordingly, the holdings of this Court in that opinion, 353 F.Supp. 473, and the reasons stated therein, are hereby affirmed. Specifically: (1) jurisdiction exists in this

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1. Plaintiff did not file a new statement of material facts as to which there is no genuine issue but relied upon the same statement she had filed before the appeal. The defendant filed a one-sentence conclusory statement saying "There are no facts of governmental involvement in the affairs of the Veterans of Foreign Wars sufficient to warrant the intervention of the Constitution of the United States or other federal statutes in this case." The plaintiff did not file a counter-statement. At the hearing on the cross-motions, plaintiff's counsel indicated that he was relying on the factors set forth in the opinion of the Court of Appeals. These factors were the subject of discovery by plaintiff and argument by both parties.

action under 28 U.S.C. § 1331; (2) the statutory charter of the VFW, 36 U.S.C. § 111 et seq., does not mandate discrimination on the basis of sex, and to the extent that plaintiff now argues that said statute authorizes or encourages discrimination on the basis of sex, this Court finds that it does not; and (3) Congressional chartering alone does not constitute the kind of significant government involvement in private discriminations that is violative of the equal protection guarantee in the due process clause of the 5th Amendment.[2]

The supplemental record reveals that the following material facts herein are not in dispute: Plaintiff, a woman, is an honorably discharged veteran having served outside the United States and having received campaign medals for such service. On February 3, 1971, plaintiff, by letter, inquired of the VFW concerning membership and stated her desire to become a member thereof. In response to her inquiry, plaintiff received a letter from the Adjutant General of the VFW stating that she was ineligible for membership since the by-laws of the VFW restricted membership to males.

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2. *Cf.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974), wherein the Court held that the state-conferred monopoly status of a public utility is not determinative of whether its action was "state action." 419 U.S. 345, 95 S.Ct. 449.

[142] Defendant VFW is a corporation[3] created and chartered by Act of Congress, 36 U.S.C. § 111 et seq., in 1936, having been before that time "a national association of men who as soldiers, sailors, marines and airmen have served this Nation in wars, campaigns, and expeditions on foreign soil or in hostile waters, . . ." 36 U.S.C. § 111. Congress gave the members of the VFW power to complete its organization including, *inter alia*, the power to adopt a constitution and bylaws, 36 U.S.C. § 112; set forth the purposes of the corporation, which are, *inter alia*, "fraternal, patriotic, historical, and educational," 36 U.S.C. § 113; gave the corporation traditional corporate powers, *e. g.*, "to sue and to be sued in courts of law and equity," 36 U.S.C. § 114; limited its membership to honorably discharged veterans of foreign service, which service entitled them to a recognized campaign medal, 36 U.S.C. § 115; provided for the acquisition of assets and liabilities of the existing association, 36 U.S.C. § 116; gave the new corporation the exclusive right to the name Veterans of Foreign Wars of the United States, the corporate seal, emblem and badges adopted by the corporation, 36 U.S.C. § 117; provided for a yearly report to Congress of its proceedings, which report "shall not be printed

3. There are nearly two million members of VFW.

as a public document," 36 U.S.C. § 118;[4] provided that before the exercise of its corporate powers that there be registered in every state an agent for the service of process, 36 U.S.C. § 119; and expressly reserved the right "to repeal, alter, or amend" the chartering Act, 36 U.S.C. § 120.

Defendant makes yearly financial audits available to Congress pursuant to 36 U.S.C. §§ 1102 & 1103. Pursuant to 10 U.S.C. § 2572, VFW is entitled to loans or gifts of condemned or obsolete combat material, and has in fact received such material, including rifles and blank ammunition. This material is made available to local posts after certification to the Secretary of the Treasury by the national organization. The net worth of the VFW is approximately $20,000,000. The organization is mainly supported by dues paid by members which are split between the local chapter, the state organization, and the national organization. The VFW is exempt from tax on income pursuant to 26 U.S.C. § 501(c)(4). Contributors to the VFW are entitled to deduct their contributions from gross income. 26 U.S.C. § 170(c)(3). Gifts and con-

4. 44 U.S.C. § 1332 provides that the proceedings of the national encampments of the VFW are to be published as Congressional documents.

tributions to the VFW have averaged less than $1,000 for the last three years.

Representatives from the VFW have been recognized by the Administrator of the Veterans' Administration, pursuant to 38 U.S.C. § 3402(a)(1), for the purpose of representing veterans under laws administered by the Veterans' Administration. The VFW has approximately 75–100 full-time representatives handling veterans' claims. These representatives represent all veterans, not just members. Counsel for defendant has represented at oral argument that this includes both men and women. There is no evidence to the contrary. Pursuant to 38 U.S.C. § 3402(a)(2), the Administrator of the Veterans' Administration has furnished office space to the paid full-time representatives from the VFW. In the last three years, representatives from the VFW have handled more than 800,000 veterans' claims to successful conclusions.

In dispute herein is the ultimate conclusion of law to be drawn from the above-mentioned facts, *i. e.*, whether there is a sufficient nexus between the Government's involvement with the VFW's exclusionary membership policy so as to make the challenged action "state action" and thus subject VFW to the restrictions of the 5th Amendment.

[143] **[1] Governmental action, or "state action", will not be found where there is insignificant governmental involvement with the challenged action of a private entity, even where that entity is otherwise heavily regulated by the government. *See* Jackson v. Metropolitan Edison Company, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); Moose Lodge v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972); Brown v. D. C. Transit System, D.C.Cir., No. 73–2089, (decided February 28, 1975); New York City Jaycees v. United States Jaycees, 512 F.2d 856 (CA 2, 1975). As the Supreme Court recently stated in *Jackson:***

> **"[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the [challenged] action of the latter may be fairly treated as that of the State itself. *Moose Lodge No. 107, supra,* 407 U.S. at 176 [92 S.Ct. 1965 at 1973]. The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met. Burton v. Wilmington Parking Authority [365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961)]." 419 U.S. at 351, 95 S.Ct. at 453.**

This inquiry takes the form of a "sifting of facts and weighing circumstances." *Burton, supra,* 365 U.S. at 722, 81

S.Ct. at 860.

[2] Having sifted the facts and weighed the circumstances herein, the Court finds itself unpersuaded that the government is in any way significantly involved with the exclusionary membership policy of the VFW.

36 U.S.C. § 118 provides that the VFW shall make a yearly report to Congress of its proceedings which report "shall not be printed as a public document." Section 118 has been modified by 44 U.S.C. § 1332 which provides that proceedings of the national encampments of certain veterans' organizations, including the VFW, are to be printed as Congressional documents. 36 U.S.C. §§ 1102 & 1103 establish uniform auditing and financial reporting requirements for private federally-chartered corporations which are required by statute to make such reports. 1964 U.S.Code Congressional and Administrative News at 3229. The VFW is one such organization required to make such reports. 36 U.S.C. § 1101(47). Clearly, having granted a federal charter to an organization, Congress has an interest in seeing that such a corporation handles itself responsibly: that Congress retains power to "repeal, alter, or amend" the charter of the VFW, 36 U.S.C. § 120, is indicative of this vested interest. Certainly, regulations requiring reports on proceedings and financial audits to be prepared

and presented to Congress is one method of determining whether an organization is acting responsibly. However, such regulations do not, explicitly or impliedly, authorize, encourage, mandate, foster, or relate to the VFW's internal membership policy. In *Jackson*, *supra*, petitioners made a similar, albeit factually stronger, argument, *viz.*, that the challenged termination practice by a public utility had been "specifically authorized and approved" by the State because the utility had filed a general tariff with the Public Utilities Commission, a provision of which stated the utility's right to terminate service for non-payment. 419 U.S. at 345, 95 S.Ct. 449. Rejecting this contention, the Court stated:

> "Approval by a state utility commission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action.' At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the

[144] choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." (Footnote omitted). 419 U.S. at 357, 95 S.Ct. at 456.

In the present action, where the federal charter gives defendant the freedom of enacting whatever bylaws it sees fit, 36 U.S.C. § 112, where defendant has exercised this freedom so as to exclude females from membership, and where the initiative for the enactment of this bylaw came from defendant, the fact that Congress requires reports and financial audits of the VFW does not transform the exclusionary membership policy of the VFW into "state action" for purposes of the 5th Amendment.

Pursuant to 10 U.S.C. § 2572, local posts of the VFW, as well as "local unit[s] of any other recognized war veterans' association," are entitled to loans or gifts of condemned or obsolete combat material. There is evidence that local VFW posts have in fact received such material, *e. g.*, rifles and blank ammunition. Plaintiff contends that this factor constitutes a significant involvement between the government and the VFW. The Court rejects this contention. While the statute is indicative of a benevolent attitude of government towards war veterans' organizations, it in no way serves to imply congressional

approval of any organization's internal policy, including the conduct of the VFW challenged herein.

[3] The VFW is exempted from a tax on income, 26 U.S.C. § 501(c)(4), and contributions to the VFW are allowed as deductions from the gross income of contributors. 26 U.S.C. § 170(c)(3).[5] VFW is not specifically named in these statutes but falls into the category of charitable and war veterans' organizations therein described. Plaintiff contends that defendant's tax status "reveal[s] a congressional intent to implement a social and economic policy of government assistance to the VFW," and "congressional approval of VFW activities and purposes, as well as its performance of [a] public function. . . ."[6] In *New York City Jaycees, supra*, wherein a local chapter of the Jaycees was challenging the exclusionary membership policy of the national organization, females being the object of the exclusion, the Second Circuit Court of Appeals, in response to the exact contention advanced herein, said:

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5. Contributions to the VFW are minimal. Stover deposition at 9; plaintiff's answer to defendant's interrogatory #4, filed September 13, 1973.

6. Plaintiff's "public function" argument is addressed *infra*.

". . . [T]he grant of tax exemptions to the Jaycees does not constitute significant government involvement in the organization's exclusionary membership policy. As the Supreme Court has pointed out in the context of a First Amendment challenge to tax exemptions granted to religious organizations, a tax exemption does not constitute government 'sponsorship' but instead 'creates only a minimal and remote involvement.' Walz v. Tax Commission, 397 U.S. 664, 675–76, 90 S.Ct. 1409, 1415, 25 L.Ed.2d 697 (1970). See also Marker v. Shultz, 158 U.S.App.D.C. 224, 485 F.2d 1003, 1005–07 (1973). No genuine nexus between the tax exemption and the complained of internal membership policies has been shown and in its absence, there is no constitutional wrong." 512 F.2d at 859.[7]

Accordingly, this Court finds no nexus between the exclusionary internal membership policy of the VFW and its tax

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7. Plaintiff relies on McGlotten v. Connally, 338 F.Supp. 448 (D.D.C.1972) (three-judge court). *McGlotten* is distinguishable because, *inter alia*, government involvement with racial discrimination, as alleged in *McGlotten*, has apparently been treated more strictly than other types of discriminations, *see McGlotten*, 338 F.Supp. at 459 n. 58; Spark v. Catholic University of America, 510 F.2d 1277 at 1282–1283 (D.C.Cir. 1973).

[145] status, and holds that plaintiff's contention on this point is unavailing. The grant of these tax exemptions does not suggest congressional approval of the challenged conduct.

[4] 38 U.S.C. § 3402(a)(1) authorizes the Administrator of the Veterans' Administration, in his discretion, to recognize representatives of certain named organizations, and representatives of "such other organizations as he may approve" for the preparation, presentation and prosecution of claims under laws administered by the Veterans' Administration. The VFW is among the specifically named organizations. Section 3402(a)(2) authorizes the Administrator, in his discretion, to furnish "office facilities for the use of paid full-time representatives of national organizations so recognized." Sections 3403 and 3404 of Title 38 authorize the Administrator, in his discretion and under certain conditions, to recognize individuals for the preparation, presentation and prosecution of claims. It is undisputed that representatives from the VFW have been so recognized and that office space has been furnished to these representatives by the Administrator for their use. Plaintiff asserts that defendant performs a "public function," in that it performs functions traditionally reserved to the government, and that the defendant should be subject to the same constitutional restrictions as the government. *See,*

e. g., Evans v. Newton, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966).[8] In *New York City Jaycees*, the Court in rejecting a similar contention therein, said:

> "The public function theory applies only to those services which are 'so clearly governmental in nature that the state cannot be permitted to escape responsibility by allowing them to be managed by a supposedly private agency.' Powe v. Miles, 407 F.2d 73, 80 (2d Cir. 1968). Furthermore, the Supreme Court in its recent decision in Jackson v. Metropolitan Edison Company, *supra*, has suggested that the service involved must not only be one which is traditionally the exclusive prerogative of the state but that it must in addition be one which the state itself is under an affirmative duty to provide, Id., 419 U.S. at 351, 95 S.Ct. at 454. In *Jackson*, the Court specifically declined to find state action on a public function theory despite the fact that defendant was a utility company, provided an essential public

8. The corollary to this proposition is that all *individuals* recognized by the Administrator to prepare, present and prosecute veterans' claims, pursuant to 38 U.S.C. §§ 3402 and 3404, would be acting in that capacity as government agents and be subject to the same restrictions.

> service, enjoyed a state-protected partial monopoly and was subject to extensive regulation by the state. Certainly the public function argument is far less persuasive in the situation before us here. Moreover, as has been pointed out, plaintiff's claim does not relate in any way to the public services provided by the Jaycees, but only to the internal membership policies of the organization." 512 F.2d at 860.

In the instant action, it is far less than clear that the government has an "affirmative duty to provide" representatives to prosecute claims against itself. The Administrator's recognition of representatives from the VFW and the other named organizations confers no implicit approval on the internal membership policies of these organizations and fails to establish a sufficiently close nexus between the government and the challenged conduct of defendant. Further, it should be pointed out that there is no claim that VFW discriminates in representing claims before the Veterans' Administration. The undisputed evidence is that defendant represents all veterans not just its own members. Stover deposition at 20. Accordingly, the Court rejects plaintiff's "public function" argument.

Undoubtedly, "[t]he foregoing factors establish a color of government involvement with the VFW that is not ade-

[146] quately described as 'Congressional chartering.'" *Stearns, supra*, 500 F.2d at 790. These factors, however, examined seriatim and in the aggregate, fail to establish a "sufficiently close nexus" between the government and the VFW "so that the [challenged] action of the latter may be fairly treated as that" of the government. *Jackson*, 419 U.S. at 351, 95 S.Ct. at 453. Significantly, there is no allegation that the government exercises control, attempts to exercise control, or otherwise intervenes with the VFW's internal policies. There certainly appears no symbiotic relationship as found in *Burton*; and the circumstances are clearly less compelling than those which appeared in *Moose Lodge* (racial discrimination) and *Jackson* (state-granted monopoly). No circumstances presented suggest any government approval of the challenged conduct. Since the Court holds that there is no government action herein, it is unnecessary to reach the question of whether there is a reasonable basis to exclude women from membership in the VFW. Accordingly, summary judgment will be entered for defendant.

* * *

APPENDIX D

NOT TO BE PUBLISHED—SEE
LOCAL RULE 8(b).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1607 (No Opinion)
September Term, 1975

Jessie Stearns, Appellant
v.
Veterans of Foreign Wars, a corporation chartered by Congress of the United States

Civil 1415-72

[Filed 1/28/76]

Appeal from the United States District Court for the District of Columbia.

Before: LEVENTHAL and WILKEY, Circuit Judges and BRYAN,* United States District Judge for the Eastern District of Virginia

JUDGMENT

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia, and briefs were filed herein by the parties. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

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*Sitting by designation pursuant to 28 U.S.C. §292(d).

On consideration of the foregoing, It is ordered and adjudged by this Court that the judgement—of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court

/s/Robert A. Bonner
Robert A. Bonner
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1607 September Term, 1975
Civil Action 1415-72

Jessie Stearns,
Appellant [Filed 2/19/76]

v.

Veterans of Foreign Wars,
a corporation chartered by
Congress of the United States

ORDER

Appellant's suggestion for rehearing *en banc* having been transmitted to the full Court and no Judge having requested a vote thereon, it is

ORDERED by the Court *en banc* that appellant's aforesaid suggestion for rehearing *en banc* is denied.

For the Court:

ROBERT A. BONNER, Clerk

By: /s/Daniel M. Cathey
Daniel M. Cathey
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1607 — September Term, 1975
Civil Action 1415-72

Jessie Stearns,
Appellant

v.

Veterans of Foreign Wars,
a corporation chartered by
Congress of the United States

[Filed 2/19/76]

Before: Leventhal and Wilkey, Circuit Judges; Bryan*, U.S. District Judge for the Eastern District of Virginia.

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam

For the Court:

ROBERT A. BONNER, Clerk

By: /s/Daniel M. Cathey
Daniel M. Cathey
Chief Deputy Clerk

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*Sitting by designation pursuant to Title 28 U.S. Code Section 292(d).

APPENDIX F

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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10 U.S.C. §2572

Subject to regulations under section 486 of title 40, the Secretary of a military department, or the Secretary of the Treasury, under regulations to be prescribed by him, may lend or give, without expense to the United States, books, manuscripts, works of art, drawings, plans, models, and condemned or obsolete combat material that are not needed by that department to— * * *

(5) a post of the Veterans of Foreign Wars of the United States; * * *

"26 U.S.C. §170

(a) Allowance of deduction

(1) General Rule. There shall be allowed as a deduction any charitable contribution (as defined in

subsection (c)) payment of which is made within the taxable year. * * *

(c) For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of– * * *

(3) A post or organization of war veterans.

"26 U.S.C. §501(c)(4)

(c) List of exempt organizations.– The following organizations are referred to in subsection (a): * * *

(4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare * * *

"36 U.S.C. §111

The following persons * * * are created and declared a body corporate, known as the Veterans of Foreign Wars of the United States.

"36 U.S.C. §113

The purposes of this corporation shall be fraternal, patriotic, historical, and educational; to preserve and strengthen comradeship among its members; to assist worthy comrades; to perpetuate the memory and history of our dead, and to assist their widows and orphans; to maintain true allegiance to the Government of the United States of America, and fidelity to its Constitution and laws; to foster true patriotism; to maintain and extend

the institutions of American freedom; and to preserve and defend the United States from all her enemies, whomsoever.

"36 U.S.C. §114

The corporation created by this chapter shall have the following powers: To have perpetual succession with power to sue and be sued in courts of law and equity; to receive, hold, own, use, and dispose of such real estate, personal property, money, contract, rights, and privileges as shall be deemed necessary and incidental for its corporate purposes; to adopt a corporate seal and alter the same at pleasure; to adopt, amend, apply, and administer a constitution, bylaws, and regulations to carry out its purposes, not inconsistent with the laws of the United States or of any State; to adopt, and have the exclusive right to manufacture and use such emblems and badges as may be deemed necessary in the fulfillment of the purposes of the corporation; to establish and maintain offices for the conduct of its business; to establish, regulate, or discontinue subordinate State and Territorial subdivisions and local chapters or posts; to publish a magazine or other publications, and generally to do any and all such acts and things as may be necessary and proper in carrying into effect the purposes of the corporation.

"36 U.S.C. §115

No person shall be a member of this corporation unless he has served honorably as an officer or enlisted man in the Armed Forces of the United States of America in any

foreign war, insurrection, or expedition, which service shall be recognized as campaign-medal service and governed by the authorization of the award of a campaign badge by the Government of the United States of America.

"36 U.S.C. §116

Said corporation may and shall acquire all of the assets of the existing national association known as the Veterans of Foreign Wars of the United States upon discharging or satisfactorily providing for the payment discharge of all its liabilities.

"36 U.S.C. §118

Said corporation shall, on or before the 1st day of January in each year, make and transmit to the Congress a report of its proceedings for the preceding fiscal year: *Provided, however,* That said report shall not be printed as a public document. * * *

"36 U.S.C. §120

The right to repeal, alter, or amend this chapter at any time is expressly reserved.

"36 U.S.C. §1102

The accounts of private corporations established under Federal law shall be audited annually in accordance with

generally accepted auditing standards by independent certified public accountants, or independent licensed public accountants, certified or licensed by a regulatory authority of a State or other political subdivision of the United States. The audits shall be conducted at the place or places where the accounts of the corporations are normally kept. All books, accounts, financial records, reports, files, and all other papers, things, or property belonging to or in use by the corporations and necessary to facilitate the audits shall be made available to the person or persons conducting the audits; and full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents, and custodians shall be afforded to such person or persons. * * *

"36 U.S. U.S.C. 1103

The report of each such independent audit shall be submitted to the Congress not later than six months following the close of the fiscal year for which the audit was made. The report shall set forth the scope of the audit and include such statements as are necessary to present fairly the corporation's assets and liabilities, surplus or deficit with an analysis of the changes therein during the year, supplemented in reasonable detail by a statement of the corporation's income and expenses during the year including the results of any trading, manufacturing, publishing, or other commercial-type endeavor carried on by the corporation, together with the independent auditor's opinion of those statements. The report shall not be printed as a public document, except as part of proceedings authorized to be printed under section 275b of Title 44. * * *

"38 U.S.C. §3402

(a)(1) The Administrator may recognize representatives of the American National Red Cross, the American Legion, the Disabled American Veterans, the United Spanish War Veterans, the Veterans of Foreign Wars, and such other organizations as he may approve, in the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration.

(2) The Administrator may, in his discretion, furnish, if available, space and office facilities for the use of paid full-time representatives of national organizations so recognized. * * *

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1624

JESSIE STEARNS,

Petitioner,

v.

VETERANS OF FOREIGN WARS,
A corporation chartered by
Congress of the United States,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILMER S. SCHANTZ, JR.
6849 Old Dominion Drive
McLean, Virginia 22101
Tel.: (703) 790-1520
Counsel for Respondent

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1624

JESSIE STEARNS,

Petitioner,

v.

VETERANS OF FOREIGN WARS,
A corporation chartered by
Congress of the United States,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATEMENT OF THE CASE

Respondent accepts the "Statement of the Case" by Petitioner except its opening sentence that "The Veterans of Foreign Wars (V.F.W.) is a private corporation *established* under federal law, 36 U.S.C. Sec. 111, *et seq.*" Respondent disagrees in so far as that statement would seem to imply that Sec. 36 U.S.C. 111,

passed in 1936 by Congress "established" the V.F.W. The V.F.W. had existed as a private association before it received a federal charter in 1936. See 36 U.S.C. Sec. 116 which provides:

> "Said corporation may and shall acquire all of the assets of the existing national association known as the Veterans of Foreign Wars of the United States upon discharging or satisfactorily providing for the payment discharge of all its liabilities."

REASONS FOR DENYING THE WRIT

I. The Mere Granting of a Federal Charter to a Private Corporation Does Not Invoke Due Process Guarantees.

The Respondent, the Veterans of Foreign Wars of the United States (hereafter V.F.W.) is a private corporation of veterans of the Armed Forces of the United States who have completed certain required foreign service. The purposes of the organization are "fraternal, patriotic, historical and educational." The V.F.W. had existed for several years prior to 1936 when it received a federal charter.

This Court in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 81 S.Ct. 856 (1961), at page 722, stated the criteria of "state involvement" and the means by which its existence or non-existence was to be determined:

> "It is clear, as it always has been since the Civil Rights Cases (US) supra, that 'Individual invasion of individual rights is not the subject matter of the amendment,' at p. 11, and that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it . . . .
>
> "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

On two occasions in this case, the United States District Judge and the United States Court of Appeals for the District of Columbia have addressed themselves to the question as to whether a federal charter alone constitutes the kind of significant state involvement in private discriminations that is violative of the equal protection guarantee in the due process clause of the Fifth Amendment. (Page 9a, Appendix A; Page 9c, Appendix C; Page 4b, Appendix B and Page 1d, Appendix D, Petition for Writ of Certiorari.) On each such occasion the answer was in the negative.

In the case of *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, 95 S.Ct. 449 (1974), this Court recently reaffirmed the principle that the determination of state involvement must be based on a particularized inquiry focusing on whether there is:

> ". . . a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."

This Court declined to find that such a "close nexus" existed in that case where the facts disclosed that a public utility furnishing electricity had been granted a partial monopoly by the State and that it was subject to a form of extensive government regulation by the State in a way most other businesses were not.

In *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 92 S.Ct. 1965 (1965), a private fraternal club refused service to plaintiff who was a guest, solely because he was a Negro. The private club was required to secure a license from the Pennsylvania Liquor Control Board in order to serve alcoholic beverages. The regulations of the Board required the club file a list of its members and employees and keep extensive financial records. The Board had the right to inspect the premises at any time patrons, guests or members were present. The Court held at page 176-177:

> "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise. . . .
>
> "We therefore hold that . . . the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge so as to make the latter 'state action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment."

See also *Millenson* v. *New Hotel Monteleone, Inc.,* 475 F.2d 736 (1973), *cert. den.* 414 U.S. 1011 (1973), where the plaintiff, a woman, claimed Fourtenth Amendment violations as the result of being refused admission to a "Men's Grill" in a hotel. The Court held she was not entitled to relief because, "The impetus for the grill's admission policies originated with the hotel and not with the state," and that the state was not in any realistic sense "a partner or even a joint venturer" in the business of the hotel.

The Petitioner argues that the mere fact of federal chartering in some manner constitutes "government involvement," but the record in this case is barren of evidence demonstrating any relationship whatever between the chartering process and the internal membership policies of the V.F.W.

II. The Record Fails To Disclose a "Symbiotic Relationship" Between the Federal Government and the V.F.W. Giving Rise to Fifth Amendment Protections.

Petitioner attempts to argue there are other "significant involvements" with the Federal Government that raise Constitutional violations. The case of *Burton* v. *Wilmington Parking Authority, supra,* is instructive as to the type of relationship necessary to trigger Constitutional safeguards. In that case a private restaurant operator leased space for a restaurant from a state parking authority in a publicly-owned building supported and maintained by public funds. The restaurant operator (Eagle) practiced racial discrimination by refusing to serve Negroes. The Court concluded that:

> ". . . the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn. . . .
>
> "The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."

It is submitted that here there is nothing approaching the "symbiotic relationship" between the State and the restaurant operator in *Burton, supra.*

Reports and Audits

Petitioner points out that the V.F.W. is required to submit an annual audit (36 U.S.C. Sections 1102-1103) and to make reports of its proceedings to Congress (36 U.S.C. Section 118). As the District Court Judge pointed out in his opinion (Page 14c-15c, Appendix C, Petition for Writ of Certiorari):

> "Clearly, having granted a federal charter to an organization, Congress has an interest in seeing that such a corporation handles itself responsibly: that Congress retains power to 'repeal, alter, or amend' the Charter of the V.F.W., 36 U.S.C. Section 120, is indicative of this vested interest. Certainly, regulations requiring reports on proceedings and financial audits to be prepared and presented to Congress is one method of determining whether an organization is acting responsibly. However, such regulations do not, explicitly or impliedly, authorize, encourage, mandate, foster, or relate to the V.F.W.'s internal membership policy."

Tax Exemption

The V.F.W. is exempted from a tax on income, 26 U.S.C. Section 501(c)(4) and contributions to the V.F.W. are allowed as deductions from the gross income of contributors (26 U.S.C. Section 170(c)(3)). Petitioner alleges that the tax exemption granted such organizations as the V.F.W. "warrants the conclusion that there is congressional approval of V.F.W. activities and purposes." The facts do not support Petitioner's conclusion. The relevant inquiry of *Moose Lodge No. 107* v. *Irvis, supra,* is whether the tax exemption can be said in any way to "foster or encourage" the internal membership policies of the V.F.W. No such facts are present here.

This same issue was raised in the case of *New York City Jaycees, Inc.* v. *United States Jaycees, Inc.,* 512 F.2d 856 (1975) where the membership policy of the United States Jaycees in excluding women was challenged, and it was alleged that the tax exemption under the same provision of the Internal Revenue Code as the V.F.W. constituted a prohibited "government involvement." The Court of Appeals for the Second Circuit held at page 859:

> "Similarly the grant of tax exemptions to the Jaycees does not constitute significant government involvement in the organization's exclusionary membership policy. As the Supreme Court has pointed out in the context of a First Amendment challenge to tax exemptions granted to religious organizations, a tax exemption does not constitute government 'sponsorship' but instead 'creates only a minimal and remote involvement.' *Walz* v. *Tax Commission,* 397 U.S. 664, 675-76, 90 S.Ct. 1409, 1415, 25 L.Ed.2d 697 (1970). See also *Marker* v. *Shultz,* 158 U.S.App.D.C. 224, 485 F.2d 1003, 1005-07 (1973). No genuine nexus between the tax exemption and the complained of internal membership policies has been shown and in its absence, there is no constitutional wrong."

Prosecution of Veterans Claims

By federal statute (38 U.S.C. Section 3402(a)(1)) the administrator of the Veterans Administration is authorized to recognize certain members of the V.F.W., to assist and to represent veterans prosecuting claims against the Veterans Administration for

veteran benefits. Other veterans' organizations are accorded the same recognition. These representatives are furnished office space for this work by the government. Petitioner asserts that "This activity suggests that it performs a public function." This same argument was made in *New York City Jaycees, Inc.* v. *United States Jaycees, Inc., supra.* The Court in disposing of that issue said:

> "Plaintiff's reliance upon the so-called 'public function' doctrine whereby private persons performing certain functions traditionally reserved to the state may become subject to constitutional restrictions is also misplaced. That doctrine is a severely limited one and 'the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions.' *Evans* v. *Newton,* 382 U.S. 296, 300, 86 S.Ct. 486, 489, 15 L.Ed.2d 373 (1966). In fact this Court has expressly recognized the 'value of preserving a private sector free from the constitutional requirements applicable to government institutions.' *Wahba* v. *New York University,* 492 F.2d 96, 102 (2d Cir. 1974). The public function theory applies only to those services which are 'so clearly governmental in nature that the state cannot be permitted to escape responsibility by allowing them to be managed by a supposedly private agency.' *Powe* v. *Miles,* 407 F.2d 73, 80 (2d Cir. 1968). Furthermore, the Supreme Court in its recent decision in *Jackson* v. *Metropolitan Edison Company,* supra, has suggested that the service involved must not only be one which is traditionally the exclusive prerogative of the state but that it must in addition be one which the state itself is under an affirmative duty to provide. *Id.,* — U.S. at —, 95 S.Ct. at 454. In *Jackson,* the Court specifically declined to find state action on a public function theory despite the fact that defendant was a utility company, provided an essential public service, enjoyed a state-protected partial monopoly and was subject to extensive regulation by the state. Certainly the public function argument is far less persuasive in the situation before us here. Moreover, as has been pointed out, plaintiff's claim does not relate in any way to the public services provided by the Jaycees, but only to the internal membership policies of the organization."

The claims presented against the Veterans Administration by the V.F.W. representatives and others on behalf of veterans are for the most part adversary actions against the Federal Government. No authority is cited by Stearns that the government has a "duty" to provide assistance for those bringing claims against it. It is equally clear that this service is provided by the V.F.W. to *all veterans*—man and women—regardless of whether they are members of the V.F.W. There is therefore no evidence of discrimination in the execution of this service by the V.F.W. It is therefore difficult to envision this service as being a vehicle for establishing a "public function" issue in the present case. There is no demonstrable relationship between this service to all veterans and the membership policies of the V.F.W. There is no basis therefore for challenging those activities.

In another recent case, *Junior Chamber of Commerce of Rochester, Inc., et al.* v. *The United States Jaycees, et al.,* 495 F.2d 883 (1974) *cert. den.* 419 U.S. 1026 (1974), the by-laws of the United States Jaycees limited its membership to males. The Junior Chamber of Commerce of Rochester, in violation of those by-

laws, admitted women as members. It was therefore expelled from the United States Jaycees. The Rochester group filed suit against the national organization, claiming violations of the Fifth and Fourteenth Amendments to the Constitution of the United States and the Civil Rights Act, 42 U.S.C. Section 1983, because the by-laws of the national organization banned women from its membership. It was alleged that the United States Jaycee organization received substantial benefits under the Internal Revenue Act by way of tax exemptions, and also administered substantial funds on behalf of the United States government.

In affirming the action of the District Court in dismissing the complaint because the federal question was insubstantial, and because the plaintiffs had failed to allege any direct relationship between the discrimination against the plaintiffs and the distribution of government funds, the United States Court of Appeals held:

> "The plaintiffs would have us rule that because the Jaycees are *used* by the state government to dispense funds on its behalf that all their conduct automatically becomes state action subject to a Sec. 1983 suit regardless of whether there exists discrimination by the private entity in the dispensing of the funds. In effect, then, plaintiffs say that the state must, consistent with the Constitution, refrain from dealing with discriminators regardless of whether the discrimination is related to the alleged state action. We disagree.
>
> ". . . The membership policy against which the attack has been leveled has no connection with the state activity of the United States Jaycees. Neither the complaint nor the record establishes or promises to establish the kind of state involvement

> essential to a civil rights action under Section 1983.
>
> ". . . We do not say that the relationship between the United States and the United States Jaycees is so remote that the actions of the Jaycees could never be attributed to the government. If, for example, the Jaycees administered the government's funds in a discriminatory manner, a remedy for constitutional violation might well obtain. In our case, however, the question is whether the United States is obligated to see to it that the United States Jaycees' conduct shall be exemplary quite apart from its administering of programs and governmental funds. No case has been cited which extends to this length. On the contrary, the criteria announced by the Supreme Court have tended to require that the alleged unconstitutional conduct relate specifically to governmental action."

CONCLUSION

This Court has recognized the clear distinction between the operation of constitutional guarantees on "private" conduct and "state" action. In *Jackson* v. *Metropolitan Edison Company, supra,* the Court stated:

> "The Due Process Clause of the Fourteenth Amendment provides 'nor shall any State deprive any person of life, liberty, or property, without due process of law.' In 1883, this Court in The Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835, affirmed the essential dichotomy set forth in that Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory and wrongful,' against which the Fourteenth Amendment offers no shield. *Shelley* v. *Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948)."

The Veterans of Foreign Wars is a private organization composed of veterans of the Armed Forces. Like most corporations, the Veterans of Foreign Wars is given powers to enact by-laws. Its membership has enacted by-laws which limit membership to men. It is submitted that this enterprize is one which cannot be said to have been the result of "government action" nor authorized, fostered or mandated by the federal government. Having failed to establish the action of the V.F.W. as "governmental" it is unnecessary to consider the issue as to whether there is a reasonable basis to exclude women from membership in the V.F.W. It is submitted therefore that the membership policy of the Veterans of Foreign Wars as decided by its membership is beyond the pale of governmental interference.

The Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit in this case should be denied.

Respectfully submitted,

WILMER S. SCHANTZ, JR.

6849 Old Dominion Drive
McLean, Virginia 22101
Tel.: (703) 790-1520

Counsel for Respondent

On the brief:

SCHANTZ, STOCK, MARSHALL & WALMA
McLean, Virginia 22101